85-1004

No.

Supreme Court, U.S.
FILED
DEC 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD F. BEAIRD,

Petitioner

vs.

MILLER'S MUTUAL INSURANCE ASSOCIATION OF ILLINOIS, a Corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

KENNETH E. BAUGHMAN*
806 West Bridge Street
P.O. Box 166
Monticello, Illinois 61856
(217) 762-9522
Attorney for Petitioner, Richard F. Beaird

* *Attorney of Record*

Pandick Midwest, Inc., Chicago • 733-6000

QUESTION PRESENTED

Does the National Labor Relations Act preempt State Court review of contract disputes between insurance companies and their agents where the insurance company retaliates against the collective action of its non-union agents?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	5
APPENDIX—Order of the Illinois Supreme Court denying Petition for Leave to Appeal	1a
Opinion of the Appellate Court, Illinois, Fifth Judicial District, affirming trial court's dismissal of Complaint II	2a
Order of Circuit Court of Madison County, Illinois, dismissing Complaint	6a
Count II of the Second Amended Complaint	8a

TABLE OF AUTHORITIES

PAGE

Cases

Ledingham v. Blue Cross Plan For Hospital Care Etc., 29 Ill. App.3d 339, 330 N.E.2d 540, (5th Dist. 1975), rev'd on other grounds, 64 Ill.2d 338, 356 N.E.2d 75, 1 Ill. Dec. 75 (1976) 3

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959) 4

Statutory Provisions

National Labor Relations Act of 1947, 29 U.S.C. §§ 151 et. seq. (1976) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD F. BEAIRD,

Petitioner

vs.

MILLER'S MUTUAL INSURANCE
ASSOCIATION OF ILLINOIS,
a Corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH JUDICIAL DISTRICT

Petitioner, Richard F. Beaird, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Fifth Judicial District, affirming the judgment of the Circuit Court of Madison County, Illinois, dismissing Count II of his Second Amended Complaint against the Respondent whereby he brought an action for breach of good faith and fair dealing against his employer based upon a written employment contract.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fifth Judicial District, is reported at 133 Ill. App. 3d 670, 88 Ill. Dec. 761, 479 N.E.2d 374 (1985), and is appended hereto (App. 2a).

JURISDICTION

The judgment of the Appellate Court of Illinois, Fifth Judicial District, affirming the dismissal of Petitioner's complaint by the Circuit Court of Madison County, was entered on May 2, 1985. No Petition for Rehearing was filed. A timely Petition for Leave to Appeal was filed with the Supreme Court of Illinois. The Petition was denied by the Supreme Court of Illinois on October 2, 1985 (App. 1a). This Petition for Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Labor Management Relations Act of 1947, 29 U.S.C., §§ 151 et seq. (1976).

STATEMENT OF THE CASE

The petitioner in this case filed a complaint for breach of good faith and fair dealing by his employer under his employment contract as contained within Count II of the Second Amended Complaint which was dismissed by the trial court for the reason that it was preempted by the *National Labor Relations Act of 1947*. 29 U.S.C. §§ 151 et seq. (1976). (App. 8a).

The Appellate Court affirmed the dismissal based upon the preemption finding by the trial court and refused to decide the other issues presented.

Count II of the pleadings alleged that the Plaintiff was an insurance agent employed with the Respondent, Miller's Mutual Insurance Association of Illinois, since September 1, 1971, pursuant to a written employment contract entered between the parties. On or about October 16, 1981, the plaintiff was forced to terminate his employment with the respondent because of

refusal to return his phone calls, refusal to give quotes for request for insurance, cancelling his policies, refusal to answer his memos or correspondence sent to the home office, failure to provide satisfactory customary service to customers, initiating unnecessary billing and collection letters directed to customers without proper explanation, raising rates or assessments with additional premiums or charges against customers without satisfactory explanation and rendering no or little cooperation to the plaintiff. It was alleged that said conduct on the part of the respondent had reduced his business income over sixty percent in the years 1980 and 1981, and that said actions were taken against the plaintiff in retaliation for his association and becoming an officer of the Society of Agents of Miller's Mutual subsequently called a Committee of Concerned Miller's Agent's, which was an organization of insurance agents of the defendant who sought to address their grievances against the defendant for the above mentioned practices as well as its poor management practices and arbitrary and unfair practice in cancellation of policies written by the agents, its poor cooperation with agents, and its poor public relations in dealing with agents and the public. The petitioner was a non-union employee of the respondent.

Illinois law has recognized a cause of action for breach of good faith and fair dealing in the case of *Ledingham v. Blue Cross Plan for Hospital Care Etc.*, 29 Ill. App. 3d 339, 330 N.E.2d 540, (5th Dist. 1975) rev'd on other grounds, 64 Ill. 2d 338, 356 N.E.2d 75, 1 Ill. Dec. 75 (1976). But for the Illinois Appellate Court's misinterpretation of the federal preemption law, the plaintiff would have stated a viable cause of action for the breach of the implied condition of good faith and fair dealing under Count II of his Second Amended Complaint.

REASONS FOR GRANTING THE WRIT:

The holding of the Fifth District Appellate Court below is too broad in that with one fell swoop it applies a doctrine of preemption to the totality of the petitioner's claim whether it be for contract, tort, or punitive damages. It was not the intent of the Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775(1959), to preempt the field of contract interpretation and enforcement by State Court action in favor of the exclusive provisions of the *National Labor Relations Act of 1947*, 29 U.S.C. § 151 et seq.

The *San Diego Case* and its progeny have left a great deal of confusion as to exactly what type of State Court action is preempted. Obviously, criminal actions are not preempted, and in certain cases injunction actions are not preempted, but it is submitted to this Court that contract actions based upon a breach in good faith and fair dealing were never intended to be preempted, especially when the action being reviewed by the State Court involves non-union employees and thus not preempted by § 301 of the *Labor Management Relations Act*, 29 U.S.C. § 185(a).

The holdings of *San Diego* and its progeny have created a great deal of hesitation on the part of the State Courts to assume jurisdiction in cases of this type. It is submitted that the Fifth District Appellate Court of Illinois has been too conservative in conceding its power to the Federal Government. This case presents an opportunity for this Court to define the outer limits of the doctrine of preemption.

It should be noted that although the record is not clear as to whether the petitioner was a union employee, the preemption concerning § 301 of the *National Labor Management Relations Act* was not raised in the lower court.

CONCLUSION

Essentially, what is at issue here is achieving uniformity in preemption cases to provide appropriate guidance to the state and federal courts. If this Court does not correct the Illinois Appellate Court's erroneous interpretation of federal law now, other courts will be misled into treating contract actions by non-union employees against their employers as being preempted by the *National Labor Relations Act*. Previous decisions of this Court do not indicate that it was the intent of Congress to preempt the field of contract actions brought by non-union employees against employers for breach of the implied condition of good faith and fair dealing. It is further submitted that the National Labor Relations Board is not qualified, nor was it the intent of the Congress to allow it to hear these contract disputes and most likely the National Labor Relations Board would refuse to hear them anyway. Otherwise, every contract dispute between an insurance company and its agents collectively would be preempted by the National Labor Relations Act.

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Fifth District of the Illinois Appellate Court herein, to authoritatively resolve the important questions presented here.

Respectfully submitted,

KENNETH E. BAUGHMAN*
806 West Bridge Street
P.O. Box 166
Monticello, Illinois 61856
(217) 762-9522
Attorney for Petitioner,
Richard F. Beaird

* *Attorney of Record*

APPENDIX

Order of Illinois Supreme Court, denying Petition for Leave to Appeal, Entered on October 2, 1985

No. 61950—Richard F. Beaird, petitioner, v. Millers' Mutual Insurance Association of Illinois, etc., respondent. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 23, 1985.

No. 5-84-0309

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RICHARD F. BEAIRD,
Plaintiff-Appellant,
v.
MILLER'S MUTUAL INSURANCE ASSOCIATION OF ILLINOIS,
a Corporation,
Defendant-Appellee.

Appeal from the Circuit Court of Madison County.

Honorable
Charles W. Chapman,
Judge Presiding.

Mr. JUSTICE KASSERMAN delivered the opinion of the court:

Plaintiff, Richard F. Beaird, filed suit against defendant, Miller's Mutual Insurance Association of Illinois, for retaliatory discharge, in which he alleged that he was constructively discharged from employment by defendant. Leave was granted plaintiff to file a second amended complaint which consisted of three counts. Defendant's motion to dismiss this complaint was granted and plaintiff perfected this appeal.

Plaintiff's second amended complaint alleged that he was entitled to be awarded damages both for retaliatory discharge and for breach of the duty of good faith and fair dealing under a contract of employment between plaintiff and defendant. Each of plaintiff's three counts alleged that defendant was an Illinois insurance corporation; that on or about September 1, 1971, the plaintiff and the defendant entered into a contract of employment; that on or about October 16, 1981, the plaintiff

was forced to terminate his employment with said defendant because of the wrongful acts of the defendant. Plaintiff averred that defendant refused to return plaintiff's telephone calls; refused to give him quotes for requests for insurance; canceled his policies; refused to answer plaintiff's memos or correspondence; failed to provide satisfactory and customary service to customers; initiated unnecessary billing and collection letters directed to customers without proper explanation, raised rates or assessment of additional premiums or charges against customers without satisfactory explanation; and rendered little or no cooperation to the plaintiff.

In Count I plaintiff further alleged that (1) said actions were taken by defendant against plaintiff in retaliation for plaintiff's association with and becoming an officer of the Society of Agents of Miller's Mutual (subsequently called the Committee of Concerned Miller's Agents), an organization of insurance agents of defendant who sought to organize a union of the defendant's insurance agents under sponsorship of the Insurance Workers International affiliated with the A.F. of L. and the C.I.O.; and (2) that the right of an employee to associate with others for purposes of selecting a bargaining agent without interference, restraint, or coercion from his employer is recognized as the public policy of the common law of this state and the policy of the Federal government as contained with 29 U.S.C. § 151. Counts II and III also alleged that defendant's actions were done in retaliation for plaintiff's union activity.

The trial court granted defendant's motion to dismiss on the basis that it did not have jurisdiction of the subject matter of the second amended complaint because it was preempted from the field by the National Labor Relations Act. (29 U.S.C. § 151 *et seq.)* The trial court further found that plaintiff failed to state a cause of action for retaliatory discharge in counts I and III and for breach of the duty of good faith and fair dealing under a contract as alleged in count II. We affirm the trial

court's judgment and find that plaintiff's complaint falls within the exclusive jurisdiction of the National Labor Relations Board.

The general rule of preemption was stated in *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, 244, 3 L. Ed. 2d 755, ____, 79 S. Ct. 773, 779, in which the court stated:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act [29 U.S.C. § 157], or constitute an unfair labor practice under § 8 [29 U.S.C § 158], due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulations involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

Although later cases have refined the *Garmon* standard (see *Sears, Roebuck & Co. v San Diego County District Council of Carpenters* (1978), 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745; *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25* (1977), 430 U.S. 290, 51 L. Ed. 2d 338, 97 S. Ct. 1056), it remains the basic test for determining the extent to which state and federal courts must defer to the jurisdiction of the National Labor Relations Board (see *Local 926, International Union of Operating Engineers, AFL-CIO v. Jones* (1983), ____ U.S. ____, ____, ____ L. Ed. 2d ____, ____, 103 S. Ct. 1453, 1458-59). The Illinois appellate court recently stated that when "an activity is even arguably subject to sections 7 or 8 of the [National Labor Relations] Act, the States must defer to the exclusive primary jurisdiction of the National Labor Relations Board." *NDK Corp. v. Local 1550 of the United Food & Commercial Workers International Union* (1st Dist. 1984), 128 Ill. App. 3d 207, ____, 470 N.E.2d 565, 567-68.

Other jurisdictions have recognized that an allegation that an employee was discharged due to participation in union activities is an allegation of unfair labor practice and falls within the exclusive jurisdiction of the National Labor Relations Board. (*Buscemi v. McDonnel Douglas Corp.* (9th Cir. 1984), 736 F. 2d 1348, 1350; *Viestenz v. Fleming Companies, Inc.* (10th Cir. 1982), 681 F.2d 699, 701-02, *cert. denied*, ____ U.S. ____, ____ L. Ed. 2d ____, 103 S. Ct. 303.) We find these authorities persuasive in the case at bar.

In the instant case, as in *Buscemi* and *Viestenz*, the thrust of all three counts of plaintiff's complaint is that he was discharged in violation of his right to engage in concerted activities for the purpose of collective bargaining and mutual aid and protection of employees. This is an activity explicitly protected by the National Labor Relations Act (29 U.S.C. §§ 157, 158) and, consequently, within the exclusive jurisdiction of the National Labor Relations Board. The trial court correctly found that plaintiff's action was preempted by the National Labor Relations Act.

Since we find that federal law preempts plaintiff's cause of action, we do not consider the other issues raised by plaintiff.

For the foregoing reasons, the judgement of the circuit court of Madison County is affirmed.

AFFIRMED.

JONES, P.J., and KARNS, J., CONCUR.

FILED
MAY 15, 1984
WILLARD V. PORTELL
CLERK OF CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF THE
Third Judicial Circuit

Madison County, Illinois.

RICHARD F. BEAIRD,
Plaintiff,

vs.

MILLERS' MUTUAL INSURANCE ASSOCIATION OF ILLINOIS, a Corporation.
Defendants

No: 82-L-920

ORDER

NOW COMES THE PARTIES HERETO, the Plaintiff herein, Richard F. Beaird, by his attorney, Kenneth E. Baughman, and the Defendant herein, Millers' Mutual Insurance Association of Illinois, by its attorneys, Hoagland, Maucker, Bernard and Altmeter;

The Defendant's Motion to Dismiss the Plaintiff's Second Amended Complaint, Counts I. II. and III. having been called for hearing pursuant to allotment by this Court on April 30, 1984 at 1:00 P.M. in Courtroom 2 of the Madison County Courthouse at Edwardsville, Illinois, the Court having considered the arguments of counsel and being fully advised in the premises finds as follows:

(1) That this Court has jurisdiction of the parties hereto, however, it finds that it does not have jurisdiction of the subject matter hereof for the reasons that it has been preempted from the field of labor law by the National Labor Relations Act, 29, U.S.C. 151 et. seq;

(2) That the Plaintiff is allowed to amend the prayer for relief by interlineation on Counts I. II. and III. of his Second Amended Complaint by describing the defendant herein as "Millers' Mutual Insurance Association of Illinois;"

(3) That the Plaintiff has failed to state a cause of action pursuant to Counts I. and III. of his Second Amended Complaint for retaliatory discharge; that he has failed to state a cause of action for the tort of the breach of the duty of good faith and fair dealing in Count II. of the Second Amended Complaint;

(4) That the Plaintiff elects to stand on his complaint and requests a final and appealable order.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That this is a final and appealable order pursuant to Rule 304 of the Illinois Supreme Court and that there is no just reason for delaying the enforcement of this judgment nor the appeal of this cause.

(2) That the Plaintiff's Second Amended Complaint Counts I., II. and III. are dismissed in all respects, the case is ordered dismissed, and the cause striken all at the Plaintiff's costs.

/s/ CHARLES CHAPMAN
Judge

5/15/84

Count II of the Plaintiff's Second Amended Complaint as Dismissed in the Trial Court

* * * *

COUNT II.

NOW COMES THE PLAINTIFF HEREIN, RICHARD F. BEAIRD, by Kenneth E. Baughman, his attorney at law, and for Count II. of his Second Amended Complaint against the Defendant, Millers' Mutual Insurance Association of Illinois, a Corporation, alleges and states in the alternative as follows:

1. That at all times mentioned herein, the Defendant, Millers' Mutual Insurance Association of Illinois, was and is an Illinois Insurance Corporation, duly authorized to write various types of insurance policies within the State of Illinois, with its principal office located in Alton, Madison County, Illinois.

2. That on or about September 1, 1971, the Plaintiff and the Defendant entered into a "Contract of Employment" a copy of which is expressly incorporated herein by reference as Plaintiff's Exhibit "A" which is attached to the original Plaintiff's Complaint filed herein.

3. That on or about October 16, 1981, the Plaintiff was forced to terminate his employment with said Defendant because of the wrongful acts of the Defendant, its agents and employees, in the following respects:

(a) refusal to return his phone calls;

(b) refusal to give him quotes for requests for insurance;

(c) cancellation of his policies;

(d) refusal to answer his memos or correspondence sent to the home office;

(e) failure to provide satisfactory and customary service to customers;

(f) initiation of unnecessary billing and collection letters directed to customers without proper explanation;

(g) raising rates or assessment of additional premiums or charges against customers without satisfactory explanation;

(h) rendering little or no cooperation to the Plaintiff.

4. That said conduct on the part of the Defendant was without cause and reduced the income from his business over 60% in the years 1980 and 1981.

5. That said actions were taken by the Defendant against the Plaintiff in retaliation for his association with and becoming an officer of the Society of Agents of Millers' Mutual and subsequently called the Committee of Concerned Millers' Agents which was an organization of insurance agents of the Defendant who sought to address their grievances against the Defendant for its practices and procedures regarding it or its agent's failure to return insurance quotes in a timely manner, unusually low commissions, its failure to maintain an expense account for its agents and to provide a WATS line, its repeated refusal of business tendered by the agents, its poor management practices, its arbitrary and unfair practice of cancellation of policies written by the agents, its poor cooperation with agents and its poor public relations when dealing with the agents and the public.

6. That there was a duty arising from said employment contract by the Defendant toward the Plaintiff to exercise good faith and fair dealing when dealing with the Plaintiff as its employee, but notwithstanding said duty, the Defendant violated the same toward the Plaintiff in the manner set forth herein by its arbitrary and capricious conduct toward the Plaintiff when taken in view of the Plaintiff's extended, faithful

full-time employment of nearly ten years, his record of increasing sales and devotion to the company, his committment of time and resources to the company, and the benefits the company obtained from his efforts.

7. That the conduct of the Defendant described herein was arbitrary, capricious, unfair and not exercised in good faith for any ligitimate business purpose except to harrass and intimidate the Plaintiff and to force him to resign.

8. That said acts on the part of the Defendant as alleged herein constituted an act of "constructive discharge" in that it made the Plaintiff's working conditions so intollerable and the pressures attendant said acts by the Defendant were so compelling that a reasonably prudent person would be justified in giving up his employment when confronted with the conditions as those alleged herein facing the Plaintiff.

9. That as a proximate cause of the aforesaid wrongful and illegal acts of the Defendant and its agents, the Plaintiff has sustained a loss and dimunition of his income in the past, present and future, exceeding an amount of $800,000.00.

10. That the aforesaid acts of the Defendant through its agents against the Plaintiff were wilful and wanton, or, performed with a reckless disregard of the rights of the Plaintiff.

11. That said acts of the Defendant were performed through management or supervisory employees acting within the scope of their employment with the Defendant.

WHEREFORE, the Plaintiff, Richard F. Beaird, demands judgment against the Defendant, Millers' Mutual Insurance Association, of Illinois a Corporation, in the amount of $800,000.00 in compensatory damages and $10,000,000.00 in punitive damages, his costs of suit and respectfully demands a trial by jury.

* * * *